

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

Plaintiff : 10-CV-1866 (BMC)

-against- : U.S. Courthouse  
Brooklyn, N.Y.

SIXTY-ONE THOUSAND NINE  
HUNDRED DOLLARS AND NO CENTS :  
(61,900.00) SEIZED FROM  
ACCOUNT NUMBER XXXXXX4429  
HELD IN NAME OF PRP RESTAURANT  
INC., AT TD BANK, N.A. ET AL.

Defendants : January 18, 2011  
4:30 p.m.

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BEFORE:

HONORABLE BRIAN M. COGAN  
United States District Judge

APPEARANCES:

For the Plaintiff: LORETTA E. LYNCH  
U.S. Attorney  
271 Cadman Plaza East  
Brooklyn, New York 11201  
BY: BRIAN D. MORRIS

For the Claimant: O'SHEA PARTNERS LLP  
Robert Potenza 521 Fifth Avenue  
25th Floor  
New York, New York 10175  
BY: ANDREW J. SOCKOL

For Material Witness: MURRAY E. SINGER  
Joseph Johnson 20 Vanderventer Avenue  
Suite 106 E  
Port Washington, New York 11050

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1 Court Reporter: RONALD E. TOLKIN, RMR, CRR  
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5 Proceedings recorded by mechanical stenography, transcript  
6 produced by Computer-Assisted Transcript.

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8 THE CLERK: United States versus \$61,900. Docket  
9 number 10-CV-1866.

10 Counsel, please state your appearance, Plaintiff?

11 MR. MORRIS: For the United States, Brian Morris.

12 Good afternoon, Your Honor.

13 THE COURT: Good afternoon.

14 MR. MORRIS: With me today I also have Richard  
15 Guerci, a financial investigator for the IRS.

16 MR. SOCKOL: For the claimant, Robert Potenza,  
17 Andrew Sockol.

18 Good afternoon, Your Honor.

19 THE COURT: Good afternoon.

20 MR. SINGER: Murray E. Singer, CJA attorney for  
21 Joseph Johnson.

22 THE COURT: Mr. Singer, although I called you in  
23 here, this is not really about you. The real question is  
24 whether I should impose a sanction on the claimant's attorney  
25 for not having disclosed at the beginning Mr. Singer's client

1 as person of knowledge.

2 Why was that not done?

3 MR. SOCKOL: Your Honor, I was not purposely hiding  
4 anything from this Court or the government. When I asked my  
5 client about anybody with knowledge of the cash at PRP  
6 Restaurant, they didn't think that it was germane to list  
7 general managers or cashiers that might handle cash as it  
8 comes in on a day-to-day basis.

9 They thought this was more about deposited to the  
10 bank accounts. I questioned counting cash and keeping the  
11 books of PRP Restaurant d/b/a Gallaghers. It was an  
12 oversight.

13 THE COURT: Did it occur to you that there might be  
14 an issue as to the amount of cash the business took in, and  
15 maybe not the cashier but the general manager wouldn't have  
16 knowledge of that?

17 MR. SOCKOL: Well, it was my understanding that all  
18 of the cash was just left for the principals of PRP  
19 Restaurant. They prepared the books and records of PRP. And  
20 they also are the only people, specifically, Robert Potenza,  
21 who ever made deposits into a bank account.

22 THE COURT: Right, but there is an underlying  
23 question in this case about the integrity of those records,  
24 right? That's what this is about, was there any cash that was  
25 not reported. So the person who would have knowledge of that,

1 it seems to me, is a pretty obvious witness for the  
2 government.

3 Now, look, I take what you told me, that you didn't  
4 intentionally mislead anybody, but I don't think you did as  
5 much investigation as you might have. Obviously your clients  
6 are going to identify the witnesses that they want deposed.  
7 They're going to identify the people who they think will back  
8 them up.

9 It's your job to make sure that the plaintiff's --  
10 or the claimant's discovery obligations are fulfilled. So  
11 you've got to dig a little deeper. So I am telling you for  
12 future reference, don't let this happen again.

13 All right?

14 MR. SOCKOL: Yes, Your Honor.

15 THE COURT: Now, Mr. Singer, when can we have your  
16 client's deposition taken?

17 MR. SINGER: Judge, I know that the claimant wants  
18 the subpoena for documents, of return those documents returned  
19 before the deposition. I do intend to put in a request to  
20 quash them. In our view, this is simply a fishing expedition,  
21 but it's not in any way -- my client's personal financial  
22 records are not in any way related to this.

23 So I intended -- at this point, I intend to put that  
24 in. At the time of my letter, I had not yet met with my  
25 client, with Mr. Johnson. But having met with him and having

1 been briefed a bit on what this case is about, I do intend to  
2 put that in. So I don't know if that will delay things.

3 THE COURT: Well, no, because we're going to deal  
4 with it right now. It will not delay anything.

5 Let me hear the government's rationale for getting  
6 the personal records of Mr. Johnson.

7 MR. SINGER: Actually, it's the claimant's request.  
8 It's their subpoena, not the government's.

9 THE COURT: That's even harder for me to understand.  
10 Explain to me how that will help you out.

11 MR. SOCKOL: Your Honor, the government's contention  
12 appears to be that some documents produced to the government  
13 by Mr. Johnson that he kept, allegedly in his duties as  
14 general manager, reports income that does not match up to the  
15 income officially recorded by PRP.

16 THE COURT: I'm sorry, he kept income?

17 MR. SOCKOL: No. He kept a tally of income.

18 THE COURT: To the business?

19 MR. SOCKOL: To the business, that doesn't match up  
20 with the official accounting records and tax records of PRP.  
21 That's my understanding of the government's position.

22 Our position is, first of all, that these records  
23 are authenticated only by Mr. Johnson himself. Also, if there  
24 was income kept -- if there was income coming into the  
25 business that was not recorded on PRP's records, it's just --

1 the theory is that Mr. Johnson could have as easily embezzled  
2 money just as easily as PRP could have. So I think it goes to  
3 motive on behalf of PRP and motive on Mr. Johnson's behalf.

4 THE COURT: Does the government have any comment on  
5 that?

6 MR. MORRIS: Well, just to put the pending motion  
7 now before Your Honor in perspective: In connection with the  
8 government's investigation, the government has, through  
9 Mr. Johnson, uncovered the proverbial second set of records.

10 Those records simply reflect several thousand  
11 dollars a day of cash received over approximately a 30-day  
12 period between the summer of 2009 and the end of 2009,  
13 certainly providing a strong motive for the underlying  
14 structuring allegation.

15 However, the motive is actually twofold, Your Honor.  
16 One is the income tax evasion of unreported income. And the  
17 second, of course, is a payroll tax evasion scheme. Because  
18 as the government has learned from Mr. Johnson, during his  
19 approximately ten-year tenure with the business beginning in  
20 2000 and concluding in April of 2010, it was the company's  
21 long standing practice to pay employees in cash and off the  
22 books; half on the books and half off the books.

23 THE COURT: Okay. So is it the claimant's view that  
24 if there was any extra money, the claimant didn't know about  
25 it either and, therefore, Mr. Johnson must have stolen it, and

1 they want to see his personal records to see if they can test  
2 that?

3 MR. SOCKOL: The claimant's view is that they are  
4 unaware of any money coming into the business that was not  
5 accurately recorded, both coming into the business through  
6 their tax returns or going out of the business through  
7 payroll.

8 Mr. Johnson told the government, and we have seen no  
9 evidence to support Mr. Johnson's contention, that payroll  
10 went out off the books. We've also seen no evidence of  
11 Mr. Johnson's contention that more money came into the  
12 business than was reported to the IRS, other than these  
13 documents that Mr. Johnson produced to the government and  
14 they're not kept in PRP's books and records.

15 THE COURT: I understand, but I'm trying to tie that  
16 to the personal records you're asking from Mr. Johnson. I'm  
17 not seeing the connection there, other than you're effectively  
18 saying that if there was extra money then he must have stolen  
19 it. And then what? It would show up where?

20 MR. SOCKOL: Well, we have reason to believe that  
21 Mr. Johnson, at the same -- it goes to the credibility, Your  
22 Honor. We have reason to believe that Mr. Johnson, at the  
23 same time as being employed by another club, was either  
24 collecting unemployment and/or not recording income earned at  
25 the other club fund that he was employed at post PRP.

1 Therefore, his tax returns are certainly germane to his intent  
2 here.

3 We also have record of a \$21,000 loan that was given  
4 to Mr. Johnson to pay off his home mortgage which he claimed  
5 to our clients that he didn't have the money to pay. This  
6 \$21,000 loan was made to Mr. Johnson, which he did not repay  
7 in full. We also have reason to believe that our client's  
8 failure to forgive this loan in its entirety is part of  
9 Mr. Johnson's motive here in trying to drive this action.

10 THE COURT: That's all fine, I don't mind you  
11 attacking his credibility in any legitimate way. But getting  
12 someone's tax returns are clearly an invasive way of attacking  
13 credibility. And generally speaking, you need to show a clear  
14 connection and a reasonable expectation that something in  
15 those tax returns will back up the credibility challenge.

16 It seems to me that if you're talking about somebody  
17 stealing money, the odds of them declaring the money they've  
18 stolen is beyond speculation. If you can give me a better  
19 rationale for why the tax returns would get you where you want  
20 to go, other than, obviously you cross examine any witness on  
21 the stand, you'd like to see their tax return because you  
22 never know what you're going to find in there, right.

23 But if you can't show me some kind of relationship  
24 here, some reason to believe there's something in the tax  
25 returns themselves that will help you that goes beyond mere



1 speculation, I'll not delay this case so that we can fight  
2 over documents and get you documents that are, at best,  
3 speculative.

4 What I will do is, you want to ask him questions for  
5 which you think you have a good faith basis, during his  
6 deposition, ask the questions. If he tells you he was  
7 skimming, we'll talk about documents again.

8 If he says absolutely not. And you ask him  
9 questions like, where'd you get the money to pay off the  
10 \$20,000, and he says my wife's income, for example, you know,  
11 I'm not going to see grounds for producing the tax returns.

12 So I will quash the subpoena to that extent at this  
13 point.

14 Now, Mr. Singer, when can your client be deposed?

15 MR. SINGER: Well, I'm not done with the document  
16 subpoena.

17 THE COURT: There's more?

18 MR. SINGER: Well, they requested all bank accounts  
19 that my client owns or has any interest in.

20 THE COURT: Okay. That's quashed. And it's quashed  
21 and it's getting real close to Rule 11.

22 MR. SINGER: They requested the personal tax returns  
23 of 2005 to the present, which you ruled on that.

24 They requested all sources of income from 2005 to  
25 the present including unemployment income. I assume that's

1 quashed with the tax returns?

2 THE COURT: Yes, it is.

3 MR. SINGER: They requested documents reflecting all  
4 credit or debts of any kind 2005 to the present.

5 THE COURT: That is quashed.

6 Is there anything else in that subpoena?

7 MR. SINGER: No, Your Honor.

8 MR. SOCKOL: Your Honor, I respectfully disagree  
9 with Mr. Singer's characterization. We understand that the  
10 financial information is quashed, but the subpoena starts off,  
11 and at least 50 percent of what we ask for are all documents  
12 and communications to/from or regarding PRP Restaurant,  
13 Gallagher's, Gallagher's 2000, which are the three  
14 reiterations of the club that existed while Mr. Johnson was  
15 employed, communications with Robert Potenza, Patricia Potenza  
16 or Alan Riale. That's the first two items of the subpoena for  
17 four lines total.

18 You quashed the second two lines, which we  
19 understand and respect. The first two lines, communications  
20 with the three principals of PRP, we feel are certainly  
21 germane to this action.

22 MR. SINGER: Any documents or communications. I'm  
23 not sure if there were oral communications.

24 THE COURT: Well, if they're oral, you have no  
25 documents to produce.

1 MR. SINGER: If the letters are e-mails that my  
2 client has with regard to communications -- again, this is  
3 very broad. It's pertaining to any topic and any subject  
4 matter.

5 THE COURT: Well, yeah, but it's only between him  
6 and the claimant.

7 MR. SINGER: Yes.

8 THE COURT: Not between him and the world.

9 MR. SINGER: Simply between him and the claimant.

10 THE COURT: I think they're entitled to use that to  
11 see if there's any indication what might or might not be  
12 credible. So you can produce those.

13 MR. SINGER: Okay.

14 THE COURT: Was anything else in the subpoena we  
15 haven't covered?

16 MR. SINGER: No, Your Honor.

17 THE COURT: Now, Mr. Singer, when can you have those  
18 documents to the claimant and proceed with the deposition?

19 MR. SINGER: I do not know if there are any such  
20 documents, but I will have an answer to that within the next  
21 couple of days. And we will -- can we just talk off the  
22 record for a moment here to try to work out a date?

23 THE COURT: Sure. But as you talk off the record,  
24 please make it a prompt date.

25 MR. SINGER: Yes, Your Honor.

1 (Off the record discussion.)

2 MR. SINGER: Judge, I believe the deposition, if  
3 it's agreeable to the Court, will be February 2nd.

4 THE COURT: That's good.

5 Now, in addition to the Mr. Johnson problem, the  
6 rest of the discovery has been completed?

7 MR. MORRIS: Your Honor, we have completed all fact  
8 depositions in the case with the exception, of course, of  
9 Mr. Johnson's deposition.

10 With respect to documents, there's one additional  
11 small production the government is still waiting for. That  
12 will be produced this week.

13 MR. SOCKOL: They asked for PRP's insurance  
14 policies, which has gone through the process and it will be in  
15 the government's hands this week.

16 THE COURT: Anything else?

17 MR. MORRIS: I guess the remaining housekeeping  
18 matter, Your Honor, will be expert discovery. The parties  
19 have conferred about potential deadlines for expert discovery.  
20 The Court previously set an expert discovery deadline of the  
21 end of this month.

22 In light of Mr. Johnson's deposition taking place,  
23 the parties respectfully request with respect to all experts  
24 except one, a period of 30 days from Mr. Johnson's deposition  
25 to complete production of expert reports as well as rebuttal

1 reports.

2 THE COURT: You're going to have a mutual exchange  
3 of reports 30 days after Johnson's deposition?

4 MR. SOCKOL: Yes.

5 THE COURT: That's fine.

6 MR. MORRIS: There's just one additional expert  
7 report, and this actually relates to a handwriting exemplar  
8 that was taken just last week, Your Honor. The IRS  
9 laboratory, I've been advised by Mr. Guerci, is actually  
10 packed up and moving locations.

11 So that 30-day period, while sufficient for another  
12 expert report is insufficient for the IRS to be able to  
13 produce its expert report. So the government would  
14 respectfully request an additional 30 days simply on that --

15 THE COURT: That's really long. That's really long.  
16 Is there really an issue about whether the signature is  
17 authentic?

18 MR. MORRIS: In this particular case, the government  
19 understands that these documents, the proverbial second set of  
20 records were really -- for instance, with respect to the  
21 claimant, the claimant is claiming in his deposition that he  
22 had never seen the document in its completed form at any time  
23 prior to meeting with his attorney a day or two before the  
24 deposition.

25 However, the government has information that not

1 only has Mr. Johnson actually -- excuse me, not only has  
2 Claimant seen the record, but Claimant's handwriting would be  
3 part and parcel for some of the information filled in on the  
4 record. The claimant disputes that.

5 So in addition to the fact witness that the  
6 government has, Mr. Johnson has testified that it's his boss'  
7 handwriting, the government wishes to proffer an expert  
8 witness to corroborate Mr. Johnson's testimony with respect to  
9 the existence of the claimant's handwriting on the proverbial  
10 second set of books.

11 THE COURT: This is a bench trial?

12 MR. SOCKOL: It was noticed for a jury trial, Your  
13 Honor?

14 THE COURT: Is there a jury trial ready in a  
15 forfeiture case?

16 MR. MORRIS: I believe if requested, sir.

17 THE COURT: Does the government have to use the IRS  
18 laboratory for its handwriting expert? It can't go out and  
19 retain a private handwriting expert?

20 MR. MORRIS: Well, I think the government could  
21 potentially look to an outside expert. However, there is an  
22 existing process, at least with respect to the Internal  
23 Revenue Services where there is an in-house laboratory that  
24 handles these matters at no cost to the taxpayer.

25 So the government's first choice would be to use its

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1 laboratory in-house, if that would meet with Your Honor's  
2 scheduling of the case.

3 THE COURT: It is longer than I want, but I can see  
4 the reason why you want to use an in-house expert.

5 March 31st.

6 MR. MORRIS: Thank you, Your Honor.

7 MR. SINGER: Thank you, Your Honor.

8 THE COURT: Plan on trying the case in -- well, let  
9 me ask this: Is either side contemplating a summary judgment  
10 motion?

11 MR. MORRIS: Not from the government.

12 THE COURT: It sounds like there's a lot of disputed  
13 facts.

14 MR. MORRIS: Indeed, Your Honor.

15 THE COURT: All right. Well, then plan on trying  
16 the case in early April. I'm not going to give you a trial  
17 date yet. I will give you a possible trial date of April  
18 11th, possible.

19 MR. SOCKOL: Just to clarify one issue, Your Honor.

20 THE COURT: Yes.

21 MR. SOCKOL: Your Honor said we have 30 days after  
22 the deposition of Mr. Johnson to exchange expert reports. Do  
23 we have 14 days after that was initially scheduled for the  
24 rebuttal reports?

25 THE COURT: That's why I asked you if you were going

1 to do everything at the same time. You don't have to do  
2 rebuttal reports, all right. You can work it out between you  
3 however you want. If you want 14 days to do rebuttal reports,  
4 that's fine. You can do that on the 16th.

5 The experts you have are unrelated to the delayed  
6 IRS handwriting expert, right?

7 MR. MORRIS: Yes.

8 MR. SOCKOL: Yes.

9 THE COURT: So you can do the initial expert reports  
10 by the 2nd of March. You can do rebuttal reports by the 16th.

11 And then are you all interested in taking the  
12 expert's depositions?

13 MR. SOCKOL: Yes, Your Honor.

14 THE COURT: Okay. Do that by the end of March,  
15 March 31st. On that day you'll have the IRS report and you  
16 will take that deposition the following week.

17 Okay?

18 MR. SOCKOL: Thank you, Your Honor.

19 THE COURT: Anything else we need to talk about?

20 MR. SINGER: One other thing I need to clarify.

21 THE COURT: Sure.

22 MR. SINGER: With regard to the documents that  
23 Mr. Johnson is to provide the claimant, there is no time frame  
24 around this subpoena. Can we have some narrowing of the time  
25 frame?



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1 THE COURT: How far back does the alleged second set  
2 of books and records go?

3 MR. MORRIS: As far as the government has in its  
4 possession, the earliest date occurs in August of 2009.  
5 However, it's the government's understanding based on  
6 information received from Mr. Johnson is that the records were  
7 really kept for a period of years prior to that. These were  
8 simply the only records or copies of which Mr. Johnson chose  
9 to obtain personally as opposed to turning into the principal  
10 of PRP for use in the business.

11 THE COURT: I think 2005, January, forward.

12 MR. SINGER: All right. Thank you, Your Honor.

13 THE COURT: Let me say one more thing to you,  
14 Mr. Sockol. Obviously I have no view in this case whether or  
15 not the government's theory is right or wrong. I'm not  
16 finding any facts here. I don't know how the case is going to  
17 turn out at trial, particularly since it's a jury trial.

18 But based on your client's lack of appreciation that  
19 Mr. Johnson would be a necessary and important witness in this  
20 case, I feel that I'm compelled to point out that you need to  
21 have a long talk with your clients.

22 Because sometimes it happens in these cases that  
23 clients have an unrealistic expectation about their ability to  
24 prosecute a claim in an in rem case, and they think they can  
25 do it with a fair amount of insulation and get their story out

1 and it will stop there. They don't understand that sometimes  
2 by throwing their hat in the ring, things can go very south  
3 for them in ways they did not even anticipate.

4 Like I said, I have no feeling at all as to whether  
5 that's what's happening here. But I have seen it happen  
6 enough before where the failure to identify the general  
7 manager suggests to me is a conversation you may want to have  
8 with your client.

9 MR. SOCKOL: Yes, Your Honor.

10 THE COURT: All right. Thank you all.

11 (Matter concluded.)  
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